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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

B189573
(Los Angeles County Super. Ct.
No. BC317170)

INDYWAY INVESTMENT,

Plaintiff and Appellant,

v.

DEBRA A. OPRI et al.,

Defendants and Respondents.

APPEAL from a judgment and an order of the Superior Court of Los Angeles County. David A. Workman, Judge. Affirmed.

Artiano, Guzman & Toomey, Artiano Guzman, Artiano & Associates, James Artiano, Grace A. Lou and Joanne K. Leighton for Plaintiff and Appellant.

Nemecek & Cole, Jonathan B. Cole, David B. Owen and Mark Schaeffer for Defendants and Respondents.

Plaintiff Indyway Investment (Indyway) failed to pay property taxes on two of its commercial rental properties (Properties). The Los Angeles County Tax Collector sold the Properties at a tax default property auction in June 2000. Indyway sued its former attorneys, defendants Debra Opri and Opri & Associates (Opri), for legal malpractice and breach of contract, alleging that Opri failed to file a claim to set aside the tax auction sales. Indyway asserted the tax sales were invalid for lack of proper notice. After a trial by court, the court found that Indyway failed to prove that it would have prevailed on a claim against Los Angeles County to set aside the tax sales and therefore failed to establish all necessary elements of its causes of action for legal malpractice and breach of contract. Indyway appealed from the judgment in favor of Opri and from an order denying Indyway's motion to tax costs. We affirm both the jugment and the order because Indyway's challenges to the sufficiency of the evidence to support the judgment are without merit and Indyway fails to establish the court erred in denying the motion to tax costs.

BACKGROUND

A. Trial

On May 8, 1992, Indyway was created. Also on May 8, Rudy and Melissa Diaz, husband and wife, conveyed the Properties and three other parcels to Indyway for 21 silver dollars. The document creating Indyway characterized it as a "Non-Associated Unincorporated Business Trust Organization." Deron Brunson was appointed Indyway's trustee. As trustee, Brunson had "absolute and exclusive power and control over the management and conduct of the businesses and affairs of [Indyway]." Melissa Diaz (Diaz) acted as Indyway's manager and meetings of Indyway were held at the Diaz residence on Baltic Avenue in Long Beach (the Baltic Avenue address). The Indyway document declared that because any property purchased by Indyway was required to be purchased with silver dollars and not federal reserve notes, its property was not subject to taxation under California law. Indyway paid no property taxes.

In August 1997, the Los Angeles County Treasurer and Tax Collector (Tax Collector) recorded in the Recorder's Office of Los Angeles County a Notice of Power to Sell Tax-Defaulted Property with respect to the Properties. By June 2000, Indyway owed about $21,000 in taxes on the Properties, together valued at $450,000. According to Diaz, up to October 1999, Indyway provided to Los Angeles County a mailing address of Post Office Box 832 in North Hollywood (the North Hollywood address).

In October 1999, Diaz contacted the Tax Collector's office regarding the tax status of the Properties. By letter dated October 13, 1999, a deputy in that office, Inez Duarte, wrote to Diaz in response to Diaz's telephone call. Duarte's letter stated that the Properties were eligible for tax sale, that Diaz had asked that all notices for the Properties be sent to the Baltic Avenue address, that cards for changing Indyway's mailing address were enclosed for each parcel, and that the completed cards should be returned to the Los Angeles County Assessor's Office (Assessor). Diaz testified that the October 1999 letter contained an error: Diaz claimed that the new mailing address for Indyway that she gave to Duarte over the telephone was not the Baltic Avenue address, but Post Office Box 6025 in Long Beach.

In May 2000, after conducting a search for the names and addresses of all parties with an interest in the Properties, including an Internet "Super Pages" search and hiring a private title company to obtain a parties of interest report, the Tax Collector generated an auction mailing list for the public auction scheduled for June 26, 2000. The list contained 11 different addresses associated with Indyway or the Properties. The Tax Collector sent, by certified mail, return receipt requested, notices of auction for each of the Properties to the 11 addresses. No notice of auction was sent to Post Office Box 6025 in Long Beach because both before and after the June 26, 2000 tax auction, Los Angeles County had no record associating that address with Indyway or the Properties.

Several of the certified mail cards were signed and returned to the Tax Collector, indicating that Indyway received the notices of the auction of the Properties scheduled for June 26, 2000. Returned to the Tax Collector from accompanying notices of auction sent to Indyway at the Baltic Avenue address were two certified mail cards (one for each of the two parcels) with the signature "Deron Brunson," Indyway's trustee. Also returned to the Tax Collector from an accompanying notice of auction sent to Indyway at the North Hollywood address was a certified mail card with the signature of Rose Diaz, Diaz's mother-in-law.

At the trial in October 2005, Diaz testified that Rose Diaz was not authorized to pick up Indyway's mail, that Rose Diaz did not have keys to the North Hollywood post office box, and that Indyway stopped using that post office box in 1996. Brunson testified, denying that his signature appeared on the certified mail cards accompanying the notices of auction sent to the Baltic Avenue address.

In testimony expressly rejected by the trial court as "an offensive contrivance," Diaz maintained that on October 16, 1999, change of address cards changing Indyway's address to Post Office Box 6025 in Long Beach were mailed to the Assessor, along with a "proof of service" signed by Diaz's acquaintance, Ray Amavisca. Copies of the change of address cards and the proof of service were admitted into evidence. Amavisca testified that Diaz called him on the morning of October 16 and asked him to help her take care of something. They first went to a

store to get envelopes. Either at the store or at the post office, Amavisca signed a proof of service for the change of address cards for the Properties. He immediately placed the change of address cards and the proof of service in an envelope addressed to the Assessor, sealed the envelope, and mailed the envelope. He denied doing anything else with the signed proof of service and denied giving the proof of service to Diaz after he signed it and before he sealed it in the envelope. When Amavisca was asked how there could be a photocopy of the proof of service containing his signature if Amavisca signed it and them immediately mailed it, Amavisca said that he did not recall exactly, but "we could have made a copy of that first." Diaz thereafter testified that she made a copy of the signed proof of service when she and Amavisca were at Office Depot.

John Moreno, who oversees the unit in the Assessor's office that processes changes of address cards, testified that the Assessor's records contained no cards for changing Indyway's address. And the Tax Collector's files contained no form for Indyway indicating that, before June 26, 2000, it had changed its address to Post Office Box 6025 in Long Beach.

The last day on which Indyway could have redeemed the Properties was the Friday before the June 26 auction, or June 23, 2000; Indyway did not redeem the Properties. At the auction of the Properties on June 26, 2000, Sung Won Yi purchased them for $82,000. Yi was not acting on behalf of Indyway. Yi obtained deeds to the Properties and thereafter transferred titles to Pyung Im.

In July 2000, Diaz wrote a letter to the Tax Collector, claiming the tax sales of the Properties were improper for various reasons and requesting that the sales be rescinded. In August 2000, Diaz also sent to the Tax Collector her declaration and a "notice of grievance and protest" and a "demand [for] cancellation of sale." Neither of the foregoing documents alleged that the notices of the auction were sent to the wrong mailing address for Indyway even though Diaz received copies of the notices from the Tax Collector's files on July 12, 2000, which notices reflected where they were sent. After the sales, county counsel reviewed the Tax Collector's file on the Properties and concluded that the sales were valid and would not be rescinded.

After the tax deeds were issued to Yi and the taxes were paid in full, a Los Angeles County computer system erroneously generated for each of the Properties a "rescission of notice of power to sell," which was recorded in January 2001. The Tax Collector later determined that such documents, which were generated when the taxpayer *redeemed* a property in tax default, were unnecessary when a property was sold in a tax sale because the deed given to the purchaser operated to cancel the prior tax lien. After discovering the computer error, the Tax Collector corrected the error by recording a cancellation of the rescission of notice of power to sell as to each of the Properties.

After the trial, the court issued a statement of decision in which the court expressly found the testimony of Amavisca, Diaz, and Brunson not to be

credible. The court gave "no credence whatsoever" to the October 1999 change of address cards, which the court considered an "offensive contrivance." The court found that Indyway had actual notice of the June 26, 2000 tax auction, Indyway's due process rights were not violated by the tax sales of the Properties because Los Angeles County complied with all relevant laws and procedures, and there was no fraud in connection with the tax sales. The court determined that Indyway would not have prevailed on a claim to set aside the tax sales of the Properties, thus rendering without merit its causes of action for legal malpractice and breach of contract. Judgment was entered in favor of Opri.

B. Post-trial Motions for Costs

After trial, Opri filed a motion seeking approximately $91,000 (later amended to approximately $89,000) in reasonable expenses, including attorney fees, incurred in proving the truth of matters which were claimed to have been unreasonably denied by Indyway in response to Opri's request for admissions. (See Code Civ. Proc., § 2033.420.) Indyway filed opposition to the motion. The court denied Opri's motion for expenses.

Opri also filed a memorandum of costs, seeking attorney fees and approximately $17,000 in costs. Indyway filed a motion to strike or to tax costs on the ground that the denial of the motion for expenses under Code of Civil Procedure section 2033.420 collaterally estopped Opri from obtaining costs and attorney fees by way of a memorandum of costs. Opri

filed a "statement of position relative to plaintiff's motion to tax costs" in which Opri conceded that, based on the court's denial of the motion for expenses, Opri was not entitled to recover attorney fees "as an item of costs in this action," but contended that the remaining items of costs sought in the memorandum of costs were recoverable. After a hearing on the motion to tax costs in March 2006, the court granted the motion to tax costs as to the attorney fees, but otherwise denied the motion, awarding Opri costs of $17,355.98. Opri had in addition filed a separate motion for contractual attorney fees. In June 2006, the court granted the motion for attorney fees and pursuant to an Order on Stipulation awarded Opri approximately $130,000 in attorney fees.

Indyway appealed from the judgment and from the order denying its motion to tax costs of approximately $17,000.

DISCUSSION

A. Appeal from Judgment

Indyway contends that the court erred in ruling (1) that it had actual notice of the tax sales, (2) that its due process rights were not violated, (3) that there was no fraud in connection with the tax sales, (4) that Indyway did not redeem the Properties, and (5) that Los Angeles County failed to comply with Revenue and Taxation Code sections 2610.5 and 3691.1.[1]

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[1] Unspecified statutory references are to the Revenue and Taxation Code.

Although framed as legal issues, Indyway's first four arguments constitute challenges to the sufficiency of the evidence, which challenges, as we explain below, are without merit. Because the fifth argument was not made in Indyway's trial brief or at trial, it has not been preserved for appeal. Were we to address the fifth contention, we would conclude that it is unsupported by any evidence in the record.

"Revenue and Taxation Code section 3691 authorizes a tax collector to sell tax-defaulted property five or more years after the default. The owner's right to redeem the property terminates at the close of business on the last business day before the sale is set. (Rev. & Tax. Code, § 3707.) [¶] Any person may purchase at a tax sale. The Revenue and Taxation Code spells out the procedures under which the sale is made, for giving notice prior to the sale, and for sharing of proceeds by taxing entities. (Rev. & Tax. Code, § 3691 et seq.) On receipt of the full purchase price the tax collector executes a deed to the purchaser. (Rev. & Tax. Code, § 3708.) . . . [¶] Except as against fraud, a tax deed is conclusive evidence that the proceedings from the assessment to the execution of the deed were regularly performed. (Rev. & Tax. Code, § 3711.)" *(Quelimane Co. v.*

Section 2610.5 deals with the requirement that the tax collector mail annual tax bill notices for properties on the secured roll.

Section 3691.1 deals with the notice by the tax collector that a tax-defaulted parcel has become subject to the power of sale.

Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 39-40.)

Notwithstanding section 3711, "[b]oth the United States Constitution and California Revenue and Taxation Code require that a tax collector make a reasonable effort to put interested parties on notice regarding an impending tax sale. [¶] Under section 3701, a tax collector is required to 'make a reasonable effort to obtain the name and last known mailing address of parties [in] interest,' but the 'validity of any sale . . . shall not be affected . . . if a party of interest does not receive the mailed notice.'" (*Bank of America v. Giant Inland Empire R.V. Center, Inc.* (2000) 78 Cal.App.4th 1267, 1272-1273, fn. omitted.) Actual notice to the taxpayer is not required, but "'when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.'" (*Jones v. Flowers* (2006) 547 U.S. 220, 238 (*Jones*), quoting *Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 315.) Due process requires the government to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action . . . ." (*Mullane*, at p. 314.)

The trial court expressly found that notices of auction were received by Indyway at the Baltic Avenue address, where Diaz resided and where Indyway regularly conducted its meetings. This finding is supported by substantial evidence, namely, the certified mail cards signed by Brunson, Indyway's trustee. Notwithstanding Brunson's denial that the

certified mail cards bore his signatures, the trial court expressly found Brunson's testimony "suspect and without credibility." The trial court was entitled to compare the handwriting on the certified mail cards with an undisputed exemplar of Brunson's signature on another document. (Evid. Code, § 1417; *Estate of Nielson* (1980) 105 Cal.App.3d 796, 801 [where authorship of will is questioned, trier of fact can determine issue by comparison with genuine or admitted handwriting of testator without aid of testimony by any witness]; *People v. Rodriguez* (2005) 133 Cal.App.4th 545, 554 [under Evid. Code § 1417, jury may determine that criminal defendant signed document by comparing handwriting on questioned document to an authenticated exemplar].) Here, the trial court impliedly did such a comparison and found that Brunson signed the certified mail cards.

The trial court also found that Indyway received a notice of auction at the North Hollywood address, the last known address for Indyway in the Los Angeles County records. This finding too is supported by substantial evidence, namely, a certified mail card signed by Diaz's mother-in-law, showing the retrieval of a notice from Indyway's post office box. Substantial evidence thus supports the conclusion that Indyway had actual notice of the tax sales.

Even if Indyway did not have actual notice, we conclude that substantial evidence supports the finding that the auction sales did not violate Indyway's due process rights because the Tax Collector employed means of notice "'such as one desirous of actually informing the [taxpayer] might

reasonably adopt to accomplish it.'" (*Jones, supra*, 547 U.S. at p. 238.) Here, the trial court found that "the County hired a private title company to obtain a Parties of Interest Report, the County then checked its records for any other properties owned by Indyway, cross-referenced all the names of individuals in its records that were affiliated with Indyway and conducted a Super Pages search in an effort to locate all possible addresses for Indyway." The foregoing steps taken by the Tax Collector were reasonably calculated, under all the circumstances, to give notice to Indyway at those addresses, and therefore the requirements of due process were met.

Our circumstances are distinguishable from those in *Jones, supra*, 547 U.S. 220, which affords no support for Indyway's claim of a due process violation. In *Jones*, a taxpayer successfully challenged the validity of the notice of a tax sale of his property where a certified letter was returned to the state tax commissioner marked "unclaimed" and then notice of the sale was published in a newspaper. The United States Supreme Court explained: "In response to the returned form suggesting that Jones had not received notice that he was about to lose his property, the State did – nothing. For the reasons stated, we conclude the State should have taken additional reasonable steps to notify Jones, if practicable to do so. The question remains whether there were any such available steps." (*Jones*, at p. 234.) After discussing several reasonable follow-up steps which the tax commissioner could have undertaken to provide notice, the court concluded that the "effort to provide notice to Jones of an

impending tax sale of his house was insufficient to satisfy due process given the circumstances of this case." (*Id.* at p. 239.)

The circumstances here are a far cry from those in Jones. The Tax Collector conducted an exhaustive search for addresses associated with Indyway and the Properties, mailing notices by certified mail to 11 different addresses. Signed certified mail cards were returned from two of those addresses. Thus, the evidence establishes that the Tax Collector reasonably could have concluded that the foregoing efforts were successful in affording Indyway actual notice of the sales. To the extent that Indyway's remaining due process arguments are based on credibility determinations and inferences rejected by the trial court, they are without merit.

In connection with the issues of fraud and redemption, Indyway again asks us to make credibility determinations and draw inferences different from those of the trial court, which we cannot do. (*In re S.C.* (2006) 138 Cal.App.4th 396, 415.) Indyway's brief also refers to exhibits which were not admitted at trial and are not included in the appellate record. We conclude that substantial evidence supports the trial court's conclusions that Yi did not purchase the Properties on Indyway's behalf, that there was no fraud in connection with the tax sales, and that Indyway did not redeem the Properties.

Indyway's contentions that Los Angeles County failed to comply with other applicable procedures and

laws, including sections 2610.5 and 3691.1, are not preserved for review because these issues were not raised at the trial (*Kuperman v. San Diego County Assessment Appeals Bd. No. 1* (2006) 137 Cal.App.4th 918, 930-931), were not specifically addressed in the statement of decision, and Indyway did not object to the statement of decision on these grounds (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 498 [objection to statement of decision must be specific]). Were we to address the merits, we would conclude that these contentions are unsupported by the evidence or any legal authority establishing that the alleged violations would constitute a basis to set aside a tax sale.

B. Order Denying Motion to Tax Costs

Indyway maintains that Opri was collaterally estopped from recovering statutory costs as the prevailing party (Code Civ. Proc., § 1032, subd. (b)) because the trial court had previously denied her motion for expenses based on Code of Civil Procedure section 2033.420, allowing costs and attorney fees incurred in proving the truth of matters denied in responding to a request for admission.[2]

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[2] Code of Civil Procedure section 1032 provides in pertinent part: "(b) Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding."

Under Code of Civil Procedure section 2033.420, subdivision (b), the court may deny recovery of expenses

As pointed out by Opri, the record does not reveal the basis for the trial court's denial of the motion under Code of Civil Procedure section 2033.420. (See fn. 2, *ante*.) One of the required elements for application of the collateral estoppel doctrine is that the issue necessarily decided at the previous proceeding must be identical to the one which is sought to be relitigated. (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 148.) Because Indyway fails to establish this element with citation to the record and pertinent authority, Indyway's challenge to Opri's cost award is without merit.

C. Opri's Motion for Sanctions and for Attorney Fees and Costs Pursuant to Contract

Pursuant to *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, Opri seeks $25,000 in sanctions on the ground that the appeal is frivolous. Although Indyway has not filed model briefs (see, e.g., *In re S.C., supra,* 138 Cal.App.4th at pp. 414-416), we decline to impose sanctions.

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sought by a party who proves the truth of a matter denied by his opponent in a response to a request for admission if it finds that "(1) An objection to the request was sustained or a response to it was waived under Section 2033.290. [¶] (2) The admission sought was of no substantial importance. [¶] (3) The party failing to make the admission had reasonable ground to believe that the party would prevail on the matter. [¶] (4) There was other good reason for the failure to admit."

Based on an attorney fee provision of the retainer contract between Indyway and Opri, Opri seeks attorney fees of approximately $46,000 if she is the prevailing party on appeal.[3] Because we affirm the judgment, Opri is entitled to her attorney fees on appeal, with the amount to be determined by the trial court on remand. (*Butler-Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918, 924; Cal. Rules of Court, rules 8.276(d), 3.1702(c).)

DISPOSITION

The judgment and the order are affirmed. Debra Opri and Opri & Associates are entitled to their costs and attorney fees on appeal. The motion of Debra Opri and Opri & Associates requesting attorney fees on appeal is granted in an amount to be determined by the trial court on remand. The motion of Debra Opri and Opri & Associates requesting sanctions on appeal is denied.

NOT TO BE PUBLISHED.

MALLANO, Acting P. J.

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[3] The retainer agreement provides in pertinent part: "Any disputes arising out of this agreement shall be arbitrated before the Beverly Hills Bar Association. If Client waives arbitration and proceeds into litigation, the successful party at the outcome of any award or judgment will be entitled to attorney fees and costs."

We concur:

VOGEL, J.

JACKSON, J.*

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* Judge of the Los Angeles Superior court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.